

The Public Policy Exception to the Employment at Will Doctrine in Ohio: A Need for a Legislative Approach

MARK D. WAGONER, JR.*

I. INTRODUCTION

As recent commentators have described the current, chaotic state of employment litigation:

This state of affairs may be a boon to lawyers, who can spend their time making fine points of legal analysis in briefs submitted to the courts. However, it creates nothing but headaches for employers, who do not know what specific standards they must meet in terminating an employee nor what the results of a mistake will be. It creates uncertainties for employees as well, whose rights are often not determined by the law but rather by the quality and inventiveness of an individual judge.¹

In recent years, few topics have received more attention from legal scholars than the erosion of the employment at will doctrine. Indeed, as this century-old overriding principle of employment relations has evolved to meet the demands of the contemporary workplace, many of these commentators have attempted to chart its future course. Exceptions now riddle this once solid foundation of the employer-employee relationship, placing employers in a precarious position virtually every time they terminate an employee. Among the most significant is the public policy exception—where an employee can state a claim for damages when an employer, in dismissing an employee, violates a clearly manifested public policy

The Supreme Court of Ohio, which in the past had shown its reluctance to recognize the public policy exception, has recently, in *Collins v. Rizkana*,² expanded the scope of Ohio's public policy exception well beyond its previous boundaries. Currently, it appears that Ohio employment law affords a terminated employee the opportunity to claim damages from its employer, apparently, for any number of reasons. However, such rapid growth begs the

* I would like to thank Blaine Brown and Joe Blasko for their helpful comments on earlier drafts of this paper. Also, I would like to dedicate this paper to my father, Mick Wagoner, who provided me with the inspiration, as well as the means, to go to law school.

¹ Jeffrey M. Hahn & Kevin M. Smith, *Wrongful Discharge: The Search for a Legislative Compromise*, 15 EMPLOYEE REL. L.J. 515, 532 (1990).

² 652 N.E.2d 653 (Ohio 1995).

question—has the Supreme Court of Ohio gone too far? In other words, has the court sacrificed predictability in the law in order to facilitate amorphous and, at times, indiscernible public policies? Moreover, have Ohio courts injected themselves into a role they are ill-suited to perform?

This Comment addresses whether such intrusions into the workplace can be legitimately entrusted to Ohio courts. In concluding that Ohio courts cannot adequately address the competing interests of employers and employees, this Comment suggests that such workplace regulation is properly handled by the Ohio Legislature. Part II of this Comment provides an abbreviated history of the employment at will doctrine, along with the concomitant rise of its exceptions. Part III narrows the scope, focusing on the rise of the public policy exception in Ohio. After this discussion, Part IV of this Comment critiques Ohio's approach to the public policy exception in light of its past decisions, paying particularly close attention to the problems Ohio's current jurisprudence creates. Finally, Part V of this Comment proposes a legislative alternative to Ohio's common law evolution in an attempt to reinstate certainty and predictability in the employer-employee relationship.

II. HISTORY OF THE EMPLOYMENT AT WILL DOCTRINE

A. *Creation of the Employment at Will Doctrine*

Any belief that the employment at will doctrine has a long and storied history in the common law is misguided. On the contrary, in looking at the employer-employee relationship over the course of common law, many have remarked upon the rapid genesis of the employment at will doctrine³ and the equally expeditious growth of its exceptions.⁴

In preindustrial England, a general presumption existed of a one-year, nonterminable relationship between an employer and his employee.⁵ The

³ See Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 127 (1976).

⁴ See ANDREW D. HILL, "WRONGFUL DISCHARGE" AND THE DEROGATION OF THE AT-WILL EMPLOYMENT DOCTRINE 13-37 (1987).

⁵ As William Blackstone described the English rule of a one-year nonterminable presumption:

If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year; upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons, as well when there is work [and when there is not].

employment relationship, in this context, reflected a master-servant relationship.⁶ The master (employer) was to provide the servant (employee) with the means to enhance his physical, as well as moral, well-being. In return, the servant was obligated to work diligently and to obey his master.⁷

In its infancy, American common law adopted the English approach to the employer-employee relationship, presuming a similar one-year, nonterminable employment contract.⁸ With the advent of the industrial revolution, however, American courts were quick to adapt the employer-employee relationship in order to respond to changes necessitated by an increasingly competitive market place.⁹ To meet these changes, a new presumption was created; namely, the employment relationship was terminable at the will of either party for any

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *425; *see also* Feinman, *supra* note 3, at 119-20; Daniel A. Mathews, Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1439 (1975). In England, the employment relationship was automatically renewed for each succeeding year if no action was taken to terminate the relationship in the preceding year. *See* Feinman, *supra* note 3, at 120. Moreover, the English courts held the employer liable for breaching an employment contract if the employer discharged the employee during the one-year period without "reasonable cause." *See* 1 BLACKSTONE, *supra*, at *426. *See also* Frank J. Cavico, *Employment at Will and Public Policy*, 25 AKRON L. REV. 497, 498-99 (1992).

⁶ *See* HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE 6 (2d ed. 1987) (describing the employment relationship as a status-based master-servant relationship).

⁷ *See id.*, *see also* Ellen R. Pierce et al., *Employee Termination at Will: A Principled Approach*, 28 VILL. L. REV. 1, 3-4 (1982) (noting that the master-servant relationship created reciprocal rights and responsibilities); Debra Drew Cyranoski, Comment, *The Model Employment Termination Act: A Welcome Solution to the Problem of Disparity Among State Laws*, 37 VILL. L. REV. 1527, 1530 (1992) (noting the reciprocal duties of the master and the servant). While some have argued that this paternalistic relationship may have been motivated by the desire of the ruling class to control laborers' wages, the presumption of the one-year contract often, in fact, protected employees from being released during unproductive off-seasons and provided some security from arbitrary employment decisions. The English rule was based on equitable principles. In the eyes of English legal scholars, inequity would result if "masters could have the benefit of servants' labor during planting and harvest seasons but discharge them to avoid supporting them during the unproductive winter[] or if servants who were supported during the hard season could leave their masters' service when their labor was most needed." Feinman, *supra* note 3, at 120. The English approach, moreover, applied the one-year presumption to all classes of workers. *Id.* (citing CHARLES SMITH, MASTER AND SERVANT 41 (1852)).

⁸ *See* Feinman, *supra* note 3, at 122-23.

⁹ *See id.*

reason.¹⁰ Many commentators have suggested that the newly created employment at will doctrine stemmed, in large part, from the pervasive laissez-faire approach to economics of the mid-nineteenth to early twentieth centuries.¹¹

¹⁰ See, e.g., *Martin v. New York Life Ins. Co.*, 148 N.Y. 117 (1895). Credit has been given to Horace G. Wood and his 1886 treatise on master-servant law which erroneously stated the nature of American common law at the time. As Wood wrote:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring and is determinable at the will of either party.

H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 136 (2d ed. 1886) (footnote omitted). Wood's rule was, for the most part, neither supported by legal history, legal precedent, nor legal analysis. See, e.g., *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025, 1030 (Ariz. 1985) (noting that "none of the four cases cited by Wood actually supported the rule"); Seymour Moskowitz, *Employment-at-Will & Codes of Ethics: The Professional's Dilemma*, 23 VAL. U. L. REV. 33, 35 (1988) ("Wood's Rule was not supported by precedent, legal history, or legal analysis. The very cases cited by Wood in his treatise did not support his rule."). But see Mayer G. Freed & Daniel D. Polsby, *The Doubtful Provenance of "Wood's Rule" Revisited*, 22 ARIZ. ST. L.J. 551, 556 (1990) ("Although the at-will rule was not universal, little question exists that Wood was articulating an idea that was generally accepted."). The four American cases Wood cited for direct support were, in fact, far off the mark. See Feinman, *supra* note 3, at 126. Nevertheless, American courts quickly embraced Wood's new-found rule as law, effectively creating the employment at will doctrine. See 1 C.B. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT § 159 n.2 (1913) (recognizing that Wood's rule was the law "in a great majority of states"); Annotation, 11 A.L.R. 469, 471 (1921).

¹¹ See Cavico, *supra* note 5, at 500; Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631, 641 (1988); Moskowitz, *supra* note 10, at 43.

Additionally, these commentators have suggested that the employment at will doctrine emerged because it was especially well-suited to the favorable business-oriented, social, economic, and political climate that existed, if not flourished, during this period. See Feinman, *supra* note 3, at 131. As the industrial revolution took hold in the United States, there "came the decline of the master-servant relationship and the rise of the more impersonal employer-employee relationship." *Wagenseller*, 710 P.2d at 1030. Emerging industrialists demanded wide-ranging ability to regulate their workforce in order to compete in the increasingly Darwinian markets. With the rise of the employment at will doctrine, employers were now empowered with the unfettered discretion to continually upgrade their labor force or the flexibility to dismiss employees during cyclical downturns in business. Furthermore, the employer potentially received increased productivity from the employees, who now had a keen motivation to maintain high performance standards in order to preserve their more

After its initial acceptance in state courts, the employment at will doctrine found its constitutional legitimacy in 1907 with the United States Supreme Court's decision in *Adair v. United States*.¹² Moreover, until the mid-1930s,

tenuous job security. See Feinman, *supra* note 3, at 131. Additionally, the emerging employment at will doctrine coincided with the then prevalent privileged status of the freedom to contract. See *id.* at 124–25. In the early nineteenth century, courts were persuaded that parties were free to contract to any terms they wished. Moreover, in the absence of any explicit terms indicating otherwise, the courts felt an employer should not be held legally bound to any contract provisions upon which the parties did not agree. Likewise, an employee could not be compelled to work for an employer if the employee chose not to do so.

¹² 208 U.S. 161 (1908). In *Adair*, a railroad employee who had fired another employee for membership in a union challenged the constitutionality of the Railway Labor Act, which criminalized such dismissals based on union membership. See *id.* at 170. The Supreme Court invalidated the law, ruling that it violated the Fifth Amendment guarantees of due process, liberty, property rights, and the freedom to contract. As Justice Harlan wrote for the majority:

[I]t is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to perform personal services for another. The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of a purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer, for whatever reason, is the same right of the employer, for whatever reason, to dispense with the services of such employé.

Id. at 174–75; see also *Lochner v. New York*, 198 U.S. 45, 64 (1905) (declaring that a state could not interfere with the liberty of contract and infringe on “the freedom of master and employé to contract with each other in relation to their employment”). Furthermore, the Court held that an employer was not under a legal obligation to retain an employee in the absence of a contract fixing a length of service or controlling the parties' conduct. See *Adair*, 208 U.S. at 175–76.

In the absence, however, of a valid contract between the parties controlling their conduct towards each other . . . it cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employé in his personal service any more than an employé can be compelled, against his will, to remain in the personal service of another.

Id.

The trend of protecting the infringement on the freedom to contract between an employer and employee continued, and with it, the increasing legitimization of the employment at will doctrine. Several years later, in the 1915 case of *Coppage v. Kansas*, 236 U.S. 1 (1915), the Supreme Court invalidated a Kansas statute that prevented employers from discharging or refusing to hire an employee because of the employee's membership in a union. See *id.* at 26. The *Coppage* Court recognized the “inequalities of fortune” existing between the employer's

employment at will continued its preeminence in employer-employee relations.¹³ Most states, including Ohio, adopted some form of the employment at will doctrine.¹⁴ Indeed, the employment at will doctrine is still adhered to in Ohio with the Supreme Court of Ohio recently holding that an employer can terminate an employee "for any cause, no cause or even in gross or reckless disregard of any employee's rights."¹⁵

B. *The Erosion of the Employment at Will Doctrine*

1. *Legislative Erosion*

Soon after the creation of the employment at will doctrine, legislative bodies, as well as the courts, began to erode its foundation. During the economic crisis of the mid-1930s, Congress was forced to re-evaluate the nature of the employer-employee relationship. In recognizing the gross inequality of bargaining power between employees and employers, Congress passed the Wagner Act in an attempt to level the existing inequalities of negotiating strength between employers and employees.¹⁶ The Act's prohibition on "discrimination in regard to hire or tenure or employment or any term or

interests and those of the employees. *See id.* at 17. Nevertheless, the Court adhered to the *Adair* precedent and held that the right of the employer to discharge an employee was a constitutionally protected property right. *See id.* at 26 ("Upon both principle and authority that the employ   shall enter into an agreement not to become or remain a member of any labor organization while so employed, is repugnant to the 'due process' clause and therefore void."). These inequalities, however, were the necessary result from the then virtually sacred property rights and the freedom to contract. *See id.* at 18-19.

¹³ Interestingly enough, "the United States is the only major industrial nation in the world which adheres to [an] employment at will doctrine." HILL, *supra* note 4, at 11.

¹⁴ *See* Feinman, *supra* note 3, at 126.

¹⁵ *Collins v. Rizkana*, 652 N.E.2d 653, 656 (Ohio 1995) (citations omitted); *see also* *Mers v. Dispatch Printing Co.*, 483 N.E.2d 150, 153 (Ohio 1985); *Fawcett v. G.C. Murphy & Co.*, 348 N.E.2d 144, 147 (Ohio 1976); *LaFrance Elec. Constr. & Supply Co. v. IBEW, Local 8*, 140 N.E. 899, 906-07 (Ohio 1923).

¹⁶ *See* 29 U.S.C.   158 (1994). In the course of the application of the Wagner Act, unions were able to negotiate for a "just cause" standard for termination through the newly created collective bargaining process. Additional employment safeguards were found in the inclusion of arbitration provisions for wrongful termination, which often took away much of the employers' arbitrary termination powers. The Wagner Act, however, did not universally change the nature of the employer-employee relationship throughout the country. Even at its peak, the Wagner Act only covered a minority of the workforce. For the majority of the nonunionized workforce, the protections of just cause dismissal and arbitration proceedings were largely unavailable.

condition of employment to encourage or discourage membership in any labor organization”¹⁷ afforded employees the first legislative protection from the harshness of the employment at will doctrine. Later, during the 1960s and 1970s, Congress, in reflecting a concern for civil rights, passed a series of remedial legislation¹⁸ seeking to curtail an employer’s ability to freely terminate its employees.¹⁹

With the limited scope and availability to most of the workforce of federal and state legislative remedies, the employment at will doctrine still governs the vast majority of employment relationships.²⁰ Recognizing the increasing harshness and arbitrariness of the employment at will doctrine in the contemporary workplace, as well as the legislative shortcomings, American courts were quick to craft judicial exceptions to the rule. These exceptions fall into the following three categories: (1) the implied contract; (2) the duty of good faith and fair dealing; and (3) the public policy exception.

¹⁷ 29 U.S.C. § 7 (1988).

¹⁸ In 1964, Congress passed Title VII of the Civil Rights Act, prohibiting discrimination in employment on the basis of race, color, religion, sex, or national origin. *See* 42 U.S.C. § 2000e *et seq.* (1994). As the concern for civil rights grew, Congress passed additional remedial legislation softening the employment at will doctrine. Included among this legislation was the Age Discrimination in Employment Act (ADEA), *see* 29 U.S.C. §§ 623, 631, 633(a) (1994) (prohibiting age-based discharge by private employers and the federal government of persons between the ages of 40 and 70 and reprisals for exercising statutory rights), the Consumer Credit Protection Act, *see* 15 U.S.C. § 1674(a) (1994) (prohibiting retaliatory dismissals based on an employee’s credit history), the Occupational Safety and Health Act (OSHA), *see* 29 U.S.C. § 660(c) (1994) (prohibiting discharge of employees in reprisal for exercising their rights under this act), and the Employment Retirement Income Security Act (ERISA), *see* 29 U.S.C. §§ 1140, 1141 (1994) (prohibiting discharge of employees in order to prevent them from attaining vested pension rights). Congress has continued this trend in recent years by passing the American with Disabilities Act (ADA), which affords over forty million Americans protection from employment discrimination on account of their handicaps. *See* 42 U.S.C. § 12101.

¹⁹ As expansive as these changes may seem, these statutory limitations on the employment at will doctrine provide only narrow exceptions to the at-will doctrine to certain employees within a protected class. Yet, the majority of the workforce still lay outside of these protected classes and thus are subject to the employment at will doctrine.

²⁰ *See* 1 PAUL H. TOBIAS, LITIGATING WRONGFUL DISCHARGE CLAIMS § 1:01 (1995).

2. Contractual Erosion

Other exceptions to the employment at will doctrine have been created by the courts on the basis of contractual obligations.²¹ Generally, these exceptions fall under the rubric of either the "covenant of good faith and fair dealing"²² or the "implied contract."²³ The covenant of good faith and fair dealing is recognized by a strong minority of states. Courts which have adopted this exception have determined that implicit in the at will employment relationship is a covenant that neither party will do anything that would limit the right of the other to receive the benefits of the relationship.²⁴ The implied contract exception, on the other hand, has been recognized by a majority of courts when the actions of the employer have been sufficient to create an implied contract of employment.²⁵

3. The Public Policy Exception

Along with these contract theories, most courts have widely applied a public policy exception to the employment at will doctrine. This exception, in its most general rubric, provides an employee damages when her termination violates a well-established public policy.²⁶

²¹ These exceptions, while extremely important in their own right, are beyond the scope of this Note. As such, only a passing reference will be made to them.

²² For a comprehensive discussion of the covenant of good faith and fair dealing, see TOBIAS, *supra* note 20, § 6:27 to :32.

²³ For a more comprehensive discussion of the implied contract exception, see *id.* § 4:01 to :56.

²⁴ See, e.g., *Metcalf v. Intermountain Gas Co.*, 778 P.2d 744 (Idaho 1989) (barring the termination of an employee when the termination was for the purpose of preventing the employee from using accrued sick leave benefits); *Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977) (stopping an employer from firing an employee to prevent that employee from receiving sales commissions).

²⁵ See, e.g., *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880 (Mich. 1980) (finding that an employee's legitimate expectation, grounded in an employer's personnel policy, statements, or manual, can create an implied contract, binding the employer to those policies); *Kestenbaum v. Pennzoil Co.*, 766 P.2d 280 (N.M. 1988) (finding a contract implied from a supervisor's representation that hiring would be permanent so long as the employee performed his job). *But see* *Rancourt v. Waterville Osteopathic Hosp.*, 526 A.2d 1385 (Me. 1987) (concluding that a supervisor's oral representation that an employee would never have to worry about losing her job was not sufficient to create a contract requiring discharge for cause only).

²⁶ Courts have recognized this exception most often when and where an employee's termination is contrary to a clear mandate of public policy as expressed in constitutional,

The public policy exception traces its origins to the 1959 California case of *Petermann v International Brotherhood of Teamsters, Local 396*.²⁷ Other states were soon to follow. As the development of the public policy exception has varied greatly from state to state, one court noted, "[T]he Achilles heel of the principle lies in the definition of public policy."²⁸ Currently, there is a wide disparity among the various state courts concerning both the application and discovery of the public policy exception,²⁹ not to mention debate over the legitimacy of the exception itself.³⁰ For instance, in an effort to combat the

statutory, or decisional law. *See, e.g.*, *Bishop v. Federal Intermediate Credit Bank*, 908 F.2d 658, 662 (10th Cir. 1990); *Gantt v. Sentry Ins.*, 824 P.2d 680 (Cal. 1992) (finding that public policy must be based on statutory or constitutional provisions, not judge-made law or other sources).

²⁷ 344 P.2d 25 (Cal. 1959). *Petermann*, who had a contract with his employer that did not state a term of employment, was terminated for refusing to commit perjury at the insistence of his employer. *See id.* at 26. The California Supreme Court, emphasizing California's adherence to the employment at will doctrine, noted that such employment is terminable at the will of either party. *See id.* at 27 (citing CAL. LAB. CODE § 2922 (West 1992), which is a provision codifying California's employment at will doctrine). Despite the predominance of the rule, the court held that "the right to discharge an employee under such a contract may be limited by considerations of public policy." *Id.* As the court concluded:

It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee, whether the employment be for a designated or unspecified duration, on the ground that the employee declined to commit perjury, an act specifically enjoined by statute in order to more fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration.

Id. *Petermann* marked the first in a steady stream of cases facilitating the growth and the validity of the public policy exception. *See, e.g.*, *Gantt*, 824 P.2d at 680 (finding that an employee who was terminated for supporting a coworker's claim of sexual harassment stated a cause of action for tortious discharge against public policy); *Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980) (holding that an employee stated a public policy exception when he was terminated for refusing to participate in an illegal scheme to fix retail gasoline prices).

²⁸ *Palamateer v. International Harvester Co.*, 421 N.E.2d 876, 878 (Ill. 1981).

²⁹ For a thorough discussion of the inconsistency among the states in the application of the public policy exception, see Christopher L. Pennington, Comment, *The Public Policy Exception to the Employment at Will Doctrine: Its Inconsistencies in Application*, 68 TUL. L. REV 1583 (1994).

³⁰ A vast majority of states allow for some sort of public policy exception to the employment at will doctrine. However, as of October 1995, five state courts refused to allow a common law public policy exception to the employment at will doctrine. These states

nebulous nature of any public policy exception, several courts have restricted the exception, in varying degrees, to instances where an employer "clearly violates" a state or federal statute.³¹ On the other hand, some courts seem more flexible in uncovering an exception.³² Coupled with this already disparate body of law, many commentators note that the enforcement of the public policy exception varies widely depending on whether the public policy was grounded in a statutory right, a legal obligation, or in furtherance of an important public interest.³³ Consequently, if not unavoidably, states vary greatly in their handling of the public policy exception.³⁴ Coinciding with the recent explosion of litigation in this area, courts are engendering new public policy exceptions at an increasingly expeditious rate. The list is seemingly endless.³⁵

include: Alabama, *see* *Grant v. Butler*, 590 So. 2d 254, 256 (Ala. 1991); *Hinrichs v. Tranquillare Hosp.*, 352 So. 2d 1130, 1131-32 (Ala. 1977); Florida, *see* *DeMarco v. Publix Super Markets, Inc.*, 384 So. 2d 1253, 1253-54 (Fla. 1980); Georgia, *see* *Troy v. Interfinancial, Inc.*, 320 S.E.2d 872, 877 (Ga. Ct. App. 1984); Mississippi, *see* *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874, 877 (Miss. 1981); New York, *see* *Murphy v. American Home Prod. Corp.*, 448 N.E.2d 86, 89 (N.Y. 1983). These courts recognize the inequality of the employer-employee relationship. They reason, however, that the legislature is the proper body with which to bring about change.

Additionally, the legislative bodies of Montana and Puerto Rico have enacted wrongful termination statutes. Both statutes codify the public policy exception; thus, their respective codifications take precedence over the common law. *See* MONT. CODE ANN. § 39-2-904 (1995); P.R. LAWS ANN. tit. 29, § 185a (Supp. 1996).

³¹ *See, e.g.*, *Borden v. Johnson*, 395 S.E.2d 628, 629 (Ga. Ct. App. 1990) (finding no public policy exception to employment at will for discharge due to pregnancy because expectations are created by the legislature, not the court, and no statute prohibits discharge due to pregnancy); *Schultz v. Production Stamping Corp.*, 434 N.W.2d 780, 782 (Wis. 1989) (finding no public policy violation where the employee could not "establish that . . . [the employer] required her to violate any constitutional or statutory provision").

³² California courts have been among the most aggressive state courts in the country in finding public policy exceptions. *See supra* note 27 and accompanying text.

³³ *See* HILL, *supra* note 4, at 6.

³⁴ As the prefatory note of the Model Employment Termination Act (META) suggests, the variety of rights and remedies among states places an employer in a precarious position. For example, consider this possible scenario presented in the prefatory note of META. An employee is hired in one state; works in another; and, finally, is terminated in yet a third. *See* Model Employment Termination Act, prefatory note, (National Conference of Commissioners on Uniform State Laws 1991). Innumerable jurisdictional, as well as substantive, questions arise in this situation.

³⁵ Public policy exceptions have been found in preserving the judicial process, such as the following: (1) perjury, *see, e.g.*, *Merkel v. Scovill, Inc.*, 570 F Supp. 133 (S.D. Ohio 1983); *Petermann v. IBEW Local 396*, 344 P.2d 25 (Cal. 1959); *DeRose v. Putnam Management Co.*, 496 N.E.2d 428 (Mass. 1986); *Sides v. Duke Hosp.*, 328 S.E.2d 818

(N.C. Ct. App. 1985); *see also* *White v. American Airlines*, 915 F.2d 1414, 1421 (10th Cir. 1990) (finding an employer liable only if the termination is "significantly motivated" by the employee's refusal to commit perjury); *Bishop v. Federal Intermediate Credit Bank*, 908 F.2d 658, 662-63 (10th Cir. 1990) (recognizing that an employee terminated because of testimony given before a congressional hearing states a claim for wrongful discharge); (2) honoring a subpoena, *see, e.g., Wiskotoni v. Michigan Nat'l Bank-West*, 716 F.2d 378 (6th Cir. 1983) (applying Michigan law) (holding that an employee terminated shortly after receiving a subpoena to testify in a grand jury hearing, even though he was the subject of the grand jury investigation, has a valid claim for wrongful termination); *Ludwick v. This Minute of Carolina, Inc.*, 337 S.E.2d 213 (S.C. 1985). *But see Harney v. Meadowbrook Nursing Ctr.*, 784 S.W.2d 921, 922-23 (Tenn. 1990) (holding that where an employee was terminated for testifying at an unemployment compensation hearing because the employer believed the testimony was untruthful, the discharge did not violate public policy); (3) serving on jury duty, *see, e.g., Nees v. Hocks*, 536 P.2d 512 (Or. 1975) (holding that an employee who was discharged for serving on a jury stated a cause of action for wrongful discharge despite the fact that no statute existed as the basis for the public policy exception); *see also Jeffreys v. My Friend's Place, Inc.*, 719 F. Supp. 639, 649 (M.D. Tenn. 1989) (granting a preliminary injunction reinstating an employee discharged in retaliation for jury service); (4) filing suit, *see, e.g., Bennett v. Hardy*, 784 P.2d 1258 (Wash. 1990) (finding that, when confronted with discrimination in the workplace, seeking the services of an attorney was a reasonable attempt to remedy employer misconduct and supported a wrongful discharge cause of action). *But see Watson v. Peoples Sec. Life Ins. Co.*, 588 A.2d 760, 765 (Md. 1991) (finding that it does not ordinarily violate public policy to discharge an employee for bringing suit against the employer).

Some courts recognize a public policy exception where an employee was discharged for the sole reason that the employee refused to perform an illegal act. For example, some courts have recognized a public policy exception when an employee has refused to violate the following laws: (1) anti-trust laws, *see, e.g., Tameny v. Atlantic Richfield Co.*, 610 P.2d 1330 (Cal. 1980) (holding that an employee discharged for his refusal to violate state and federal anti-trust laws stated a cause of action for wrongful discharge); *see also Haigh v. Matsushita Elec. Corp. of Am.*, 676 F. Supp. 1332, 1352 (E.D. Va. 1987) (holding that a former employee's allegations that he was discharged for refusing to participate in illegal price fixing stated cause of action under Virginia law); *Winther v. DEC Int'l, Inc.*, 625 F. Supp. 100, 104 (D. Colo. 1985) (citing to California law for support in finding that an employee discharged for refusal to engage in illegal exclusive dealing and tying arrangements stated a cause of action for wrongful discharge despite lack of standing to sue under anti-trust laws); (2) consumer protection laws, *see, e.g., Laws v. Aetna Fin. Co.*, 667 F. Supp. 342 (N.D. Miss. 1987) (recognizing that a plaintiff stated a cause of action for wrongful discharge where he alleged he was terminated for refusing to violate the Federal Truth in Lending Act and a similar state law, despite the fact that the Mississippi Supreme Court had not yet recognized an exception to the at-will rule); *see also Harless v. First Nat'l Bank*, 246 S.E.2d 270, 276 (W. Va. 1978) (finding that an employee dismissed for reporting violations of state and federal consumer credit laws to superiors stated a claim for wrongful discharge). *But see Sequoia Ins. Co. v. Superior Court*, 13 Cal. App. 4th 1472, 1475 (Cal. Ct. App. 1993)

(finding that an employee terminated for failing to participate in a scheme to circumvent insurance law did not state a claim for wrongful discharge in violation of public policy); (3) public health and safety laws, *see, e.g.*, *Adams v. George W. Cochran & Co.*, 597 A.2d 28 (D.C. Cir. 1991) (holding that an employee who was discharged for refusing to drive a truck that lacked required inspection stickers stated a valid cause of action for wrongful discharge); *Webb v. HCA Health Servs. of Midwest, Inc.*, 780 S.W.2d 571 (Ark. 1989) (finding that an employer violated public policy when it requested that an employee falsify a business record used in complying with a federal medical cost containment program); *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385 (Conn. 1980) (finding an employee discharged for urging his employer to comply with state Uniform Food, Drug, and Cosmetic Act stated a claim for wrongful discharge); *Phupps v. Clark Oil & Ref. Corp.*, 408 N.W.2d 569 (Minn. 1987) (concluding that an employee stated a claim for wrongful discharge because he refused to pump leaded gasoline into a car equipped to take unleaded gasoline). *But see* *Stuart v. Beech Aircraft Corp.*, 753 F. Supp. 317, 325 (D. Kan. 1990) (holding that, where there was no evidence that the action complained of by the employee would lead a reasonable person to conclude that the employer was violating a safety regulation no public policy exception applied); (4) other federal laws, *see, e.g.*, *Verduzco v. General Dynamics, Inc.*, 742 F. Supp. 559 (S.D. Cal. 1990) (holding that a defense plant employee discharged for complaining to management about lax security that could result in compromising national security stated a retaliatory discharge claim even though he did not report the conditions to any outside agency); *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100 (Colo. 1992) (recognizing a public policy exception where a NASA inspector was allegedly discharged for refusing to violate a federal statute that prohibited and made criminal the falsification of reports to federal agencies); *Peterson v. Browning*, 832 P.2d 1280 (Utah 1992) (holding that an employee discharged for refusing to violate state tax law and federal customs regulations could bring suit under the state's public policy exception). *But see* *Hicks v. Resolution Trust Corp.*, 970 F.2d 378, 382 (7th Cir. 1992) (finding an employee terminated for reporting his employer's noncompliance with the Community Reinvestment Act did not state a cause of action for wrongful discharge under state law); *Rachford v. Evergreen Int'l Airlines, Inc.*, 596 F. Supp. 384, 385 (N.D. Ill. 1984) (holding that an employee discharged for reporting violations to the Federal Aviation Administration did not state a cause of action for wrongful discharge because the employee's claim relied on federal law and therefore did not allege a violation of a "clear mandate of public policy of the state"); (5) administrative regulations, *see, e.g.*, *Skillsky v. Lucky Stores, Inc.*, 893 F.2d 1088 (9th Cir. 1990) (finding that an employee terminated when an employer learned he had filed an OSHA complaint against a former employer stated a claim for wrongful discharge under California law); *Pierce v. Ortho Pharm. Corp.*, 417 A.2d 505 (N.J. 1980) (holding that administrative rules and regulations may form the basis for a public policy exception). *But see* *Merck v. Advanced Drainage Sys., Inc.*, 921 F.2d 549, 554-55 (4th Cir. 1990) (stating that a constructively discharged employee could not rely on state highway regulations where those regulations were not sufficiently specific to constitute a clear public policy mandate); and (6) codes of ethics, *see, e.g.*, *General Dynamics Corp. v. Superior Court*, 876 P.2d 487 (Cal. 1994) (finding that a former in-house counsel could pursue a claim for wrongful discharge where he was allegedly terminated for pointing out to his superiors that the company's pay policy appeared to violate

III. OHIO AND THE PUBLIC POLICY EXCEPTION

Until 1990, Ohio was reluctant to recognize the public policy exception. Indeed, given Ohio's strict adherence to the employment at will doctrine over the preceding one hundred years, the emergence in Ohio of the public policy exception in the past decade has been, admittedly, rapid and expansive. Yet, during this period of growth, uncertainty, and judicial inconsistency have dominated the public policy landscape. While much of this wavering can be attributed to the growing pains associated with the evolution of common law doctrine, it has nonetheless placed employers in a precarious position. To fully appreciate the unpredictability inherent in the current common law of the public policy exception, a brief chronological sketch of the major public policy cases

federal employment law and he hired an attorney to pursue a worker's compensation claim); *Pierce*, 417 A.2d at 505 (finding that the professional code of ethics may contain an expression of public policy sufficient to support an exception to the at-will rule).

Additionally, courts have reached inconsistent results as to whether a local ordinance can provide the basis for a wrongful discharge action. *See Gould v. Campbell's Ambulance Serv. Inc.*, 488 N.E.2d 993, 995 (Ill. 1986) (holding that where the state left the regulation of ambulances to municipalities, the local ordinance was not a clearly mandated public policy of Illinois). *But see Hobson v. McLean Hosp. Corp.*, 522 N.E.2d 975, 977 (Mass. 1988) (holding that an employee stated a cause of action based on public policy where she was discharged due to her attempt to enforce a local fire regulation).

Furthermore, courts have split as to whether activities related to law enforcement can serve as sufficient grounds for a public policy exception. *See, e.g., Belline v. K-Mart Corp.*, 940 F.2d 184 (7th Cir. 1991) (holding that employees who report unlawful conduct to an employer can successfully bring a claim for retaliatory discharge); *Palmateer v. International Harvester Co.*, 421 N.E.2d 876 (Ill. 1981) (finding that an employer violated public policy when he discharged an employee for reporting possible criminal conduct of other employees to the authorities). *But see Giudice v. Drew Chem. Corp.*, 509 A.2d 200, 202 (N.J. Super. Ct. App. Div. 1986) (noting that "[p]rivate investigation of possible criminal activities of fellow employees does not implicate the same public policy considerations [as] cooperating with law enforcement officials investigating possible criminal activities of fellow employees").

Also, most states recognize a public policy exception where an employee is discharged for filing a worker's compensation claim. *See, e.g., Firestone Textile Co. v. Meadows*, 666 S.W.2d 730 (Ky. 1983); *Thompson v. Medley Material Handling, Inc.*, 732 P.2d 461 (Okla. 1987); *Brown v. Transcon Lines*, 588 P.2d 1087 (Or. 1978). *But see Smith v. Gould, Inc.*, 918 F.2d 1361, 1365 (8th Cir. 1990) (applying Nebraska law); *Martin v. Tapley*, 360 So. 2d 708, 709 (Ala. 1978). The disparity of application in both the law and remedies in the context of wrongful dismissal claims is staggering. Indeed, inconsistency in application predominates the public policy exception.

in Ohio is necessary.³⁶ Only then can one understand the consistent reversal of precedent by the Supreme Court of Ohio in this area.

A. *Phung v Waste Management, Inc. (1986)*³⁷

An Ohio appellate court first accepted the public policy exception to the employment at will doctrine in *Phung v Waste Management, Inc.*³⁸ Phung, a chemist employed by the defendant Waste Management, brought a wrongful termination suit alleging that he was dismissed for reporting that his employer was operating its business in violation of federal and state law.³⁹ Phung claimed his termination contravened a clear public policy. The appellate court agreed by noting:

[S]imply because the legislature has not acted in this area does not mean that this court should ignore the recent judicial developments in our sister states. "The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's society and tend to discredit the law should be readily rejected."⁴⁰

Thus, in order to keep "current of what is right and just," the court felt a public policy exception must be recognized to the employment at will doctrine.⁴¹

The Supreme Court of Ohio, however, disagreed.⁴² The court refused to recognize the public policy exception, holding that Phung's claims were nothing more than "broad, conclusory allegations that Waste Management, Inc. was violating certain unspecified legal and societal obligations."⁴³ The court, using the Ohio Constitution, believed that the state legislature, not the courts, was the

³⁶ For a background of Ohio's treatment of the employment at will doctrine prior to its acceptance of the public policy exception, see generally Eugene N. Lindenbaum, Note, *The Status of the Employment-at-Will Doctrine in Ohio: Ohio Incorporates a Public Policy Exception*, 52 OHIO ST. L.J. 315, 319-25 (1990).

³⁷ 491 N.E.2d 1114 (Ohio 1986).

³⁸ C.A. No. S-84-4, 1984 WL 14394 (Ohio Ct. App. Oct. 19, 1984).

³⁹ See *Phung*, 491 N.E.2d at 1115. The defendant, which operated a toxic waste disposal facility, allegedly was violating, on a large scale basis, "its legal and societal obligations." *Id.*

⁴⁰ *Phung*, 1984 WL 14394, at *5. Interestingly enough, this decision was written by Ohio Supreme Court Justice Douglas while he was an appellate judge for the Sixth District Court of Appeals.

⁴¹ See *id.*

⁴² See *Phung*, 491 N.E.2d at 1116-17.

⁴³ *Id.* at 1116.

proper branch to protect the welfare of employees.⁴⁴ Thus, the Ohio Legislature's silence on this issue was construed to be a denial of the right to relief for such a claim.⁴⁵

B. *Greeley v Miami Valley Maintenance Contractors, Inc.* (1990)

Soon after *Phung* was decided, the Supreme Court of Ohio reversed precedent and, for the first time, recognized a public policy exception to the employment at will doctrine in *Greeley v Miami Valley Maintenance Contractors, Inc.*⁴⁶ In the case, Greeley alleged that he was wrongfully terminated by his employer when it received a court order to garnish his wages. Specifically, Greeley's wages were garnished for his refusal to meet his child support obligations.⁴⁷

In interpreting the statute, the Supreme Court of Ohio concluded that the legislature would not have intended to allow employers to circumvent the goals of the statute, namely ensuring fulfillment of child support payments, by paying a minimal fine.⁴⁸ In fact, in order to facilitate the goals behind the statute, reinstatement and backpay must be an available remedy.⁴⁹ Thus, a "sufficiently

⁴⁴ See *id.* at 1117 ("[T]he Ohio Constitution delegates to the legislature the primary responsibility for protecting the welfare of employees.").

⁴⁵ Justice Brown's dissent in *Phung*, however, was a harbinger of things to come for the public policy exception in Ohio. See *id.* (Brown, J., dissenting). In his dissent, Justice Brown reiterated many of the same concerns evident in Justice Douglas's appellate court decision. In the absence of legislative action, Justice Brown felt the court was under an obligation to provide remedies where an employee's rights have been seriously violated. See *id.* at 1120 (Brown, J., dissenting). As such, Justice Brown argued that because the employment at will doctrine was a judicially created rule, the court was faced with an even more compelling obligation to recognize a cause of action for wrongful discharge in violation of public policy. See *id.* (Brown, J., dissenting). By responding to the Ohio Supreme Court's decision in *Phung v. Waste Management, Inc.*, the Ohio Legislature became one of the first states in the country to pass a whistleblower's protection act. For a discussion of whistleblower protection acts see *infra* note 123.

⁴⁶ 551 N.E.2d 981 (Ohio 1994).

⁴⁷ Because terminating an employee for such a reason violated OHIO REV. CODE ANN. § 3113.213(D) (Baldwin 1994), the employer was fined five hundred dollars. The statute, however, did not provide Greeley with a means to seek reinstatement. The lower courts were reluctant to recognize Greeley's tort claim for wrongful discharge because Ohio at the time, as a result of *Phung*, was reluctant to recognize a public policy exception.

⁴⁸ *Greeley*, 551 N.E.2d at 985. Although the statute did not explicitly provide for a civil remedy of reinstatement or backpay, there was little reason to doubt that the legislature had intended to preclude this remedy.

⁴⁹ See *id.* at 985-86.

clear public policy" was found.⁵⁰ Moreover, the court realized that other public policy exceptions might be recognized if the discharges were "of equally serious import as the violation of a statute."⁵¹

C. Tulloh v Goodyear Atomic Corp. (1992)

In *Tulloh v Goodyear*,⁵² the Supreme Court of Ohio retreated from allowing public policy to be determined from sources other than statutes. Tulloh, a former uranium materials handler employed by the Goodyear Atomic Corporation, alleged that he was terminated as a result of his demands that his employers' "plant be operated in a manner consistent with statutory, regulatory and societal obligations."⁵³ The Supreme Court of Ohio, however, found that Tulloh had not stated a claim for relief. The court held that "[a]bsent statutory authority, there is no common-law basis in tort for a wrongful discharge claim."⁵⁴ The court felt Tulloh was unable to base his wrongful termination charge upon any statutory authority and, hence, did not fall under the public policy exception.⁵⁵

⁵⁰ *Id.* at 986. The court in *Greeley* pointed out that the public policy exception found was merely a "modification" of the employment at will doctrine. In fact, the court explicitly pointed out that *Greeley* was still in harmony with past decisions, including *Phung*, and that the employment at will doctrine was still "alive and well" in Ohio. *Id.* However, *Greeley* did establish that the right of an employer to terminate for "any cause" no longer included situations where the discharge would thwart the clear intention of a statute and thus contravene public policy. *Id.* at 987

⁵¹ *Id.*

⁵² 584 N.E.2d 729 (Ohio 1991), *overruled by* *Painter v. Graley*, 639 N.E.2d 51 (Ohio 1994).

⁵³ *Id.* at 730. In addition to filing an intentional tort claim, Tulloh also filed a wrongful termination claim. The trial court dismissed Tulloh's claim on a jurisdictional issue. *See id.* at 731. Specifically, the trial court dismissed Mr. Tulloh's claim for lack of subject matter jurisdiction as a result of the Labor Management Relations Act, 29 U.S.C. § 185 (1994). On appeal to the appellate court, Tulloh's claim was dismissed because, according to the court, there was no statutory basis for Tulloh's wrongful termination claim. Tulloh also alleged an intentional tort claim. Specifically, he alleged that while working at the plant, he was exposed to radioactive dust, chips, and fumes causing him severe bodily harm. *See id.* at 731. Among his injuries, Tulloh complained of "sinusitis, pharyngitis, laryngitis, abdominal pain [sic], cramping, vomiting, nausea and extreme upper respiratory and gastrointestinal dysfunction." *Id.*

⁵⁴ *Id.* at 733.

⁵⁵ *See id.* at 734. In his dissent, Justice Douglas correctly predicted the future course of the employment at will doctrine in Ohio. *See id.* (Douglas, J., dissenting). Douglas claimed that the majority had misread *Greeley* and consequently, had misapplied the law. Douglas

D. Painter v. Graley (1994)

This limited scope of possible public policy exceptions, however, was to be short lived. In *Painter v. Graley*,⁵⁶ the Supreme Court of Ohio opened the door to a wide variety of sources from which a public policy exception could be discerned. Shirley Painter, a former chief deputy clerk of municipal courts, brought a wrongful termination suit against her supervisors alleging that her termination for running for city council violated a clear public policy.⁵⁷

As a result of a statute allowing for a municipal supervisor's discretion in terminating employees, the Supreme Court of Ohio found that Painter was pre-

read *Greeley* differently, writing that he "would reaffirm the view in *Greeley* that the public policy exception to the employment at will doctrine need not be premised solely upon the violation of a specific statutory provision." *Id.* (Douglas, J., dissenting)

The foundation of the majority's position of clear statutory intent was further shaken by the presence of a fragile five to three majority where two votes in the majority were from substitute judges. The judges sitting as substitutes were Judge Dean Strausbaug of the Tenth Appellate District sitting for Justice Holmes and Judge Stephen R. Shaw of the Third Appellate District sitting for Justice Herbert K. Brown. Both judges voted in the majority. *See id.* at 733.

⁵⁶ 639 N.E.2d 51 (Ohio 1994).

⁵⁷ *See id.* at 55. Painter formally declared to her supervisors that her reason for leaving was "to seek political office in the City of Cleveland." In order to allow herself time to campaign, Painter requested a leave of absence from her job for an indefinite period of time. During her campaign, the assistant personnel director for the municipal clerk's office, Charles Graley, notified Painter that she had been terminated from her employment at the clerk's office. *See id.* at 52.

In response to her dismissal, Painter filed suit in state court demanding reinstatement to her chief deputy clerk position, an award for backpay, punitive damages, and attorney's fees. The trial court, basing its decision on the common law of other jurisdictions, awarded summary judgment in favor of Painter and ordered that she be reinstated to her former position along with backpay. The trial court based its decision on the common law of California, Illinois, and Minnesota. *See id.* at 53; *see Mancuso v. Taft*, 476 F.2d 187 (1st Cir. 1973); *Vincent v. Maeras*, 447 F. Supp. 775 (S.D. Ill. 1978); *Johnson v. Cushing*, 483 F. Supp. 608 (D. Minn. 1980).

The Eighth District Court of Appeals, however, reversed the trial court and ordered judgment in favor of the defendant-appellee Graley. *See Painter*, 639 N.E.2d at 53. Using the previous precedent established in *Greeley* and *Tulloh*, the court found that Painter had not established sufficient statutory justification for a public policy exception. *See id.* Furthermore, the court found the trial court's authority in other courts unpersuasive since it construed federal laws and decisions. *See id.*

empted from stating a common law claim.⁵⁸ Yet, Justice Sweeney, in dicta, suggested a new methodology for determining the existence of a public policy exception.⁵⁹ Contrary to the limited scope of *Tulloh*, Justice Sweeney found “[t]he existence of such a public policy may be discerned by the Ohio judiciary based on sources such as the Constitutions of Ohio and the United States, legislation, administrative rules and regulations, and the common law.”⁶⁰ In providing a framework in which to evaluate such dismissals, the public policy was to be of “equally serious import as the violation of a statute.”⁶¹ Unfortunately, Justice Sweeney provided only vague ambiguities of exactly what criteria made a public policy of “equally serious import as a violation of a statute.”⁶² Moreover, the court provided only vague guidance to what constituted the actual elements of the tort, allowing it to evolve by means of “how the common law develops.”⁶³

⁵⁸ The court found that the Ohio Legislature had codified Painter’s position as an employee-at-will serving at the discretion of the supervisor. *Id.* at 57; see OHIO REV. CODE ANN. § 1901.32 (Baldwin 1994). Thus, Justice Sweeney felt the legislative directive precluded the court from finding a “sufficiently clear public policy” for her wrongful termination suit. *See Painter*, 639 N.E.2d at 57.

⁵⁹ The court’s prior decision in *Tulloh* had oversimplified the problem, noted Justice Sweeney. *See id.* at 56. The court felt that it had the obligation to correct common law errors. As a result, it set out to remedy the situation. *See id.* As Justice Sweeney wrote, “When the common law has been out of step with the times, and the legislature, for whatever reason, has not acted, we have undertaken to change the law, and rightfully so. After all, who presides over the common law but the courts.” *Id.* (quoting *Gallimore v. Children’s Hosp. Med. Ctr.*, 617 N.E.2d 1052, 1059 (Ohio 1993)).

Interestingly enough, only a four to three majority affirmed Justice Sweeney’s proposed approach. *See Painter*, 639 N.E.2d at 57. Only four justices concurred with paragraph three of the syllabus, with the three other justices not concurring in the new approach. Syllabus three reads as follows:

“Clear public policy” sufficient to justify an exception to the employment at will doctrine is not limited to public policy expressed by the General Assembly in the form of statutory enactments, but may also be discerned as a matter of law based on other sources, such as the Constitutions of Ohio and the United States, administrative rules and regulations, and the common law.

Id. at 52 (citation omitted). The syllabus went on to expressly overrule *Tulloh*. *See id.*

⁶⁰ *Id.* at 56.

⁶¹ *Id.* (citation omitted).

⁶² *See id.*

⁶³ *See id.* at 57. Specifically, the court suggested the use of Villanova Law Professor Perritt’s four-step analysis in evaluating a wrongful termination claim might be helpful. For a more detailed discussion of Perritt’s approach, see *infra* notes 79–80.

E. Collins v. Rizkana (1995)

1. Facts

*Collins v Rizkana*⁶⁴ is the most recent and perhaps, most relevant case dealing with Ohio's current approach to the public policy exception. Rebecca Collins first worked for Dr. Rizkana at the Acme Animal Hospital in Canton, Ohio between 1982 and 1986. Throughout her employment, she complained of Dr. Rizkana's incessant "groping and grabbing and touching."⁶⁵ As a result of the continued harassment, Collins quit her job.⁶⁶ In spite of Dr. Rizkana's behavior, Collins returned to work for Dr. Rizkana in 1987.⁶⁷ Upon her return, Dr. Rizkana assured Collins that the harassment would stop. Shortly thereafter, Collins was given the position of manager, earning a salary of \$300 per week. Despite Dr. Rizkana's assurances, Collins testified that the harassment began again.⁶⁸ In response, Collins quit her job and filed a

⁶⁴ 652 N.E.2d 653 (Ohio 1995).

⁶⁵ *Id.* at 655.

⁶⁶ *See id.* At the time of her original departure, she took no remedial action because, in her words, "sexual harassment was not thought of I didn't know of the Ohio Civil Rights Commission or anything of that nature. I went directly to an unemployment bureau." *Id.*

⁶⁷ *See id.*

⁶⁸ *See id.* Collins testified that Dr. Rizkana would physically molest her, along with engaging in frank and improper sexual discussions. As Collins testified,

[Dr. Rizkana] "would start the same thing. He'd get you in a corner, try to feel you up, he'd grab your hand, try to put it in his pants. If he had a chance as you were walking by, he'd pinch your boob. He'd grab your butt when you were in the med room."

Id. (quoting Collins's testimony) Additionally, Collins also testified in her deposition that Dr. Rizkana was "'constantly talking of sexual stuff, wanting to know how my husband and my sex life was, that you never lived until you had a foreign experience. He told me about prostitutes that he had in I do believe it was Paris.'" *Id.* (quoting Collins's testimony).

Despite Collins's loud and verbal protests, the harassment continued. *Id.* Collins also testified that, at times, she would tell Dr. Rizkana:

"[D]on't touch me, leave me alone. I would start getting loud. There have been times when he's put his hand across my mouth to shut me up or he would tell me, 'Shh, there's customers.' I didn't want him to touch me so I was getting loud." Also, "[t]here were times he tried to kiss [her]."

complaint with the Ohio Civil Rights Commission.⁶⁹

On May 8, 1992, Collins filed a complaint against Dr. Rizkana alleging claims for wrongful termination and intentional infliction of emotional distress.⁷⁰ The trial court entered summary judgment in favor of Dr. Rizkana on Collins's wrongful termination claim.⁷¹ Because Dr. Rizkana never employed four or more persons at the Acme Animal Hospital, as is required to fall under the jurisdiction of Ohio Revised Code section 4112.01(A)(2), the trial court could find no statute on which to base its public policy exception.⁷² The court of appeals affirmed the summary judgment upon a similar basis.⁷³

2. Ohio Supreme Court—A Multi-Source Public Policy Exception

Justice Resnick, the author of the majority opinion, began her analysis of the current state of Ohio employment law by reiterating that the employment at will doctrine was still the accepted rule throughout the state. She wrote:

Id. (quoting Collins's testimony).

⁶⁹ She was precluded, however, from filing a complaint because Dr. Rizkana at no time employed four or more workers and therefore, did not fall under the jurisdiction of Ohio Revised Code section 4112.01(A)(2) which limits the jurisdiction of the statute to those employers who employ any more than four employees at any time. *Id.*

⁷⁰ In his deposition, Dr. Rizkana denied that any form of sexual harassment or sexual discrimination had taken place. *See Collins*, 652 N.E.2d at 655. He testified that "[t]he only time she [Collins] mention[ed] sexual harassment is when she start[ed] asking for [a] raise and she saw [the] Anita Hill-Clarence Thomas case. 'You give me \$50 or I will sue you for sexual harassment.'" *Id.* (alterations in original). Furthermore, Dr. Rizkana testified that he had never reduced Collins's pay, but had warned her that her excessive absenteeism was becoming a problem and threatened her that if she didn't work consistently, that he would reduce her pay for every hour she called off work. *See id.* Upon hearing this warning, Rizkana testified, Collins quit and threatened to bring forth a lawsuit for sexual harassment. *See id.*

⁷¹ The trial court, using the precedent established in *Greeley*, held:

[T]he *Greeley* case clearly allows an exception to the employment at will doctrine only when an employee is discharged in violation of a statute. Plaintiff was not discharged in violation of R.C. 4112.01(A)(2) because that statute only applies to "any person employing four or more persons within the state."

Id. at 656 (citation omitted) (emphasis deleted) (citing OHIO REV CODE ANN. § 4112.01(A)(2) (1995)). *Panther v. Graley* had not yet become the law of Ohio.

⁷² *See id.* at 656. As a result, Collins then voluntarily dismissed her other claims. *Id.*

⁷³ *See Collins v. Rizkana*, No. CA-9310, 1993 Ohio App. LEXIS 5828, *25 (5th App. Dist. Nov. 22, 1993).

The traditional rule in Ohio and elsewhere is that a general or indefinite hiring is terminable at the will of either party, for any cause, no cause or even in gross or reckless disregard of any employee's rights, and a discharge without cause does not give rise to an action for damages.⁷⁴

She noted, however, that the employment at will doctrine is "a harsh outgrowth of outdated and rustic notions."⁷⁵ In order to preserve the "basic liberties"⁷⁶ of the working man's rights, she recognized that a "proper balance must be maintained among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out."⁷⁷ As such, Justice Resnick reasoned that there may be certain times when a public policy exception to the at will doctrine is necessary

The court went on to reaffirm *Graley*, holding that sufficiently clear public policy may be discerned from not only statutes, but from other sources such as "the Constitutions of Ohio and the United States, administrative rules and regulations, and the common law"⁷⁸ The court, moreover, then formally adopted Justice Sweeney's proposed methodology in *Painter*⁷⁹ Briefly, the four steps adopted are:

1. That [a] clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the *clarity* element).
2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the *jeopardy* element).
3. The plaintiff's dismissal was motivated by conduct related to the public policy (the *causation* element).

⁷⁴ *Collins*, 652 N.E.2d at 656 (citations omitted).

⁷⁵ *Id.* at 657

⁷⁶ *Id.*

⁷⁷ *Id.* (citations omitted).

⁷⁸ *Id.* (citation omitted).

⁷⁹ In *Painter*, Justice Sweeney suggested this method in dicta. See *Painter v. Graley*, 639 N.E.2d 51, 57 (Ohio 1994). Justice Sweeney borrowed the methodology of Villanova Professor Henry H. Perritt, Jr. See Henry H. Perritt, Jr., *The Future of Wrongful Dismissal Claims: Where Does Employer Self-Interest Lie?*, 58 U. CIN. L. REV. 397 (1989).

4. The employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element).⁸⁰

In dividing the law-making and fact-finding responsibilities between the judge and jury, the court noted "that the clarity and jeopardy elements, 'both of which involve relatively pure law and policy questions,' are questions of law to be determined by the court."⁸¹ On the other hand, the causation element and the overriding justification element, providing factual questions, are properly resolved by the jury.⁸²

3. *Application*

Using this new four-step analysis, the court determined that there was the presence of the first element of the tort—namely the clarity requirement. In searching the Ohio Revised Code, Justice Resnick discovered at least two general sources of a statutory expressed public policy that gave rise to a wrongful termination cause of action.⁸³ First, she turned to Ohio Revised Code sections 2907.06,⁸⁴ 2907.21,⁸⁵ and 2907.25.⁸⁶ Concluding that these statutes

⁸⁰ *Collins*, 652 N.E.2d at 657–58 (quoting Perritt, *supra* note 79, at 398–99) (alteration in original). In his article, Professor Perritt proposes subdividing the jeopardy element into three subdivisions as follows: (1) Decide what kind of conduct is necessary to further public policy; (2) Decide whether the employee's actual conduct fell within the protected conduct; (3) Decide if the threat of dismissal is likely in the future to discourage employees from engaging in similar conduct. See Perritt, *supra* note 79, at 408.

⁸¹ See *Collins*, 652 N.E.2d at 658 (citation omitted).

⁸² See *id.* (citation omitted).

⁸³ See *id.* at 658. She noted, additionally, that each of these elements independently would have been enough to allow recognition of a cause of action on its own.

⁸⁴ The text of section 2907.06 reads as follows:

Sexual Imposition

(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

(1) The offender knows that the sexual contact is offensive to the other person, or one of the other persons, or is reckless in that regard.

(2) The offender knows that the other person's, or one of the other person's, ability to appraise the nature of or control the offender's touching person's conduct is substantially impaired.

express a strong public policy protecting sexual bodily security and integrity, as well as prohibiting offensive sexual contact, Justice Resnick found a sufficient statutory basis for a wrongful termination cause of action.⁸⁷ For additional

(3) The offender knows that the other person, or one of the other persons, submits because of being unaware of the sexual contact.

(4) The other person, or one of the other persons, is thirteen years of age or older but less than sixteen years of age, whether or not the offender knows the age of such person, and the offender is at least eighteen years of age and four or more years older than such other person.

(B) No person shall be convicted of a violation of this section solely upon the victim's testimony unsupported by other evidence.

(C) Whoever violates this section is guilty of sexual imposition, a misdemeanor of the third degree.

OHIO REV. CODE ANN. § 2907.06 (Baldwin 1994).

⁸⁵ The text of section 2907.21 reads as follows:

Compelling prostitution

(A) No person shall knowingly do any of the following:

(1) Compel another to engage in sexual activity for hire;

(2) Induce, procure, solicit, or request a minor to engage in sexual activity for hire, whether or not the offender knows the age of the minor;

(3) Pay or agree to pay a minor, either directly or through the minor's agent, so that the minor will engage in sexual activity, whether or not the offender knows the age of the minor;

(4) Pay a minor, either directly or through the minor's agent, for the minor having engaged in sexual activity, pursuant to a prior agreement, whether or not the offender knows the age of the minor.

(B) Whoever violates this section is guilty of compelling prostitution, a felony of the third degree.

OHIO REV. CODE ANN. § 2907.21 (Baldwin 1994).

⁸⁶ The text of section 2907.25 reads as follows:

Prostitution

(A) No person shall engage in sexual activity for hire.

(B) Whoever violates this section is guilty of prostitution, a misdemeanor of the third degree.

OHIO REV. CODE ANN. § 2907.25 (Baldwin 1994).

⁸⁷ "In order to more fully effectuate the state's declared public policy against sexual harassment," wrote Justice Resnick, "the employer must be denied his generally unlimited

support, Justice Resnick demonstrated that other courts have found similar statutes in their respective jurisdictions to also embody sufficiently clear expressions of public policy.⁸⁸

Second, Justice Resnick found another source of public policy in an Ohio civil rights statute.⁸⁹ She wrote, "It is clear that a civil rights statute prohibiting employment discrimination on the basis of sex may provide the necessary expression of public policy on which to premise a cause of action for wrongful discharge based on sexual harassment/discrimination."⁹⁰

Having satisfied the clarity element, Justice Resnick then addressed whether allowing the dismissal would jeopardize this new-found public policy. Although each statute provided some specific form of remedies for each violation, the issue which "most often arises under the jeopardy analysis," Justice Resnick wrote, "is whether the public policy tort should be rejected where the statute

right to discharge an employee-at-will, where the reason for the dismissal . . . is the employee's refusal to be sexually harassed." *Collins*, 652 N.E.2d. at 658.

⁸⁸ Specifically, Justice Resnick compared Ohio law with Maryland, Arizona, Arkansas, and North Carolina law on the issue of inferring public policy. *See Harrison v. Edison Bros. Apparel Stores, Inc.*, 924 F.2d 530, 534 (4th Cir. 1991) (applying North Carolina law and finding a public policy exception motivated by her complaints against her manager stemming from conduct including unconsented sexual touching and requests for sex); *Lucas v. Brown & Root, Inc.*, 736 F.2d 1202, 1205 (8th Cir. 1984) (applying Arkansas law and finding public policy based on Arkansas's public policy prohibiting prostitution); *Wagenseller v. Scottsdale Mem. Hosp.*, 710 P.2d 1025, 1035 (Ariz. 1985) (finding a public policy exception where the discharge was motivated by the plaintiff's refusal "to participate in activities which arguably would have violated our [Arizona's] indecent exposure statute"); *Watson v. Peoples Sec. Life Ins. Co.*, 588 A.2d 760, 767 (Md. 1991) ("The clear mandate of public policy which Watson's discharge could be found to have violated was the individual's interest in preserving bodily integrity and personality, reinforced by the state's interest in preventing breaches of the peace, and reinforced by statutory policies intended to assure protection from workplace sexual harassment.").

⁸⁹ Specifically, Justice Resnick looked to Ohio Revised Code section 4112.02 (A). This section reads in its entirety as follows:

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions or privileges of employment, or any matter directly or indirectly related to employment.

OHIO REV CODE ANN. § 4112.02(A) (Baldwin 1994).

⁹⁰ *Collins*, 652 N.E.2d at 659.

expressing the public policy already provides adequate remedies to protect the public interest.”⁹¹ She noted, however, that there were two reasons why the availability of remedies under the statutes would not serve to defeat Collins’s wrongful termination claim.⁹²

First, citing authority from other states, Justice Resnick noted that the issue of adequacy of remedies is confined to cases “[w]here right and remedy are part of the same statute which is the *sole source* of the public policy opposing the discharge.”⁹³ Because the clarity element had been found from multiple sources, namely Ohio Revised Code sections 4112.02 and 2907.06, the right had, in effect, transcended the remedy provisions of these statutes and allowed for an independent tort claim. Second, Justice Resnick noted that the legislature had not intended to preempt common law remedies by enacting these statutes.⁹⁴ In addressing the jurisdictional requirement of Ohio Revised Code section 4112.02, Justice Resnick responded, “[W]e cannot find it to be Ohio’s public policy that an employer with three employees may condition their employment upon the performance of sexual favors while an employer with four employees may not.”⁹⁵

III. PROBLEMS WITH OHIO’S APPROACH TO THE PUBLIC POLICY EXCEPTION

Undeniably, the Supreme Court of Ohio must be given credit for joining the vast number of jurisdictions recognizing a public policy exception to the employment at will doctrine. A public policy exception is crucial to the workplace, not only to protect the rights of individual employees, but also to facilitate the interests of society as a whole. Indeed, given the reprehensible behavior of Dr. Rizkana, it would offend fundamental notions of justice not to afford Collins some form of relief. This Comment does not question Collins’s right for recovery, rather this Comment disagrees with the amorphous

⁹¹ *Id.* at 660.

⁹² *See id.*

⁹³ *Id.* (citation omitted).

⁹⁴ Yet, it must be noted that it is impossible to determine exactly what the legislature intended in this regard. Furthermore, Justice Resnick failed to address that both of these statutes had been passed prior to the Ohio courts’ acceptance of a public policy exception to the employment at will doctrine. Justice Resnick looked to *Helmick v. Cincinnati Word Processing, Inc.*, 543 N.E.2d 1212 (Ohio 1989), and noted “that there is nothing in the language or legislative history of R.C. Chapter 4112 barring the pursuit of common-law remedies for injuries arising out of sexual misconduct.” *Collins*, 652 N.E.2d at 660 (citation omitted).

⁹⁵ *Id.* at 651.

framework the Supreme Court of Ohio puts forth to grapple with public policy issues. Particularly, the proposed framework of the court provides little, if any, guidance to facilitate an acceptable compromise between ensuring employees' rights and affording employers predictability. By granting the courts unfettered discretion to determine the proper basis as well as remedies for a public policy exception, the Supreme Court of Ohio has pried open a proverbial Pandora's Box of potentially frivolous litigation.⁹⁶ Indeed, even in the test's incipient stages, Ohio appellate courts have already been forced to deal with a wide variety of creative public policy claims brought under the four-part test set forth in *Collins*.⁹⁷

To remedy the situation, Ohio courts are in need of legislative guidance. These decisions of dividing interest between employee and employer rights are more conducive to a legislative remedy, which affords mandated consistency and methodology.⁹⁸ Giving Ohio courts potentially unfettered discretion

⁹⁶ See Jay Finegan, *Law and Disorder, Inc.*, Apr. 1994, at 64. Finegan notes that employment related lawsuits have risen by more than 2,200% in the last two decades. See *id.* at 64. In fact, Finegan estimates that employment related suits now account for an estimated one-fifth of all civil suits filed in United States courts. See *id.* Finegan attributes much of this increase to the erosion of the employment at will doctrine and the increase in scope of federal legislation. See *id.* at 66.

⁹⁷ See, e.g., *DiGiannantonio v. Dillon*, No. 95-APE09-1198, 1996 Ohio App. LEXIS 2542 (10th App. Dist. June 20, 1996) (asserting a claim for wrongful discharge that was a product of defendant's continual making of gross and revolting sexual remarks and innuendo on a daily basis); *Hillyer v. Timken Mercy Med. Ctr.*, No. 95-CA-0402, 1996 Ohio App. LEXIS 2889 (5th App. Dist. June 3, 1996) (asserting a claim for damages because plaintiff was allegedly terminated for filing a grievance with the Department of Labor); *Rasch v. Allied Elec.*, No. 67836, 1996 Ohio App. LEXIS 134 (8th App. Dist. Jan. 18, 1996) (asserting a claim for damages because of plaintiff's termination based on an allegedly wrongful accusation of sexual harassment); *Greenwood v. Taft, Stettinius & Hollister*, 105 Ohio App. 3d 295 (1st App. Dist. 1995), *appeal dismissed*, 75 Ohio St. 3d 1204 (1996) (asserting a claim for damages because plaintiff was terminated as a result of his sexual orientation in violation of Cincinnati's Human Rights Ordinance).

⁹⁸ As one commentator has noted:

The resolution of all the questions that must be addressed before an informal decision to modify the at will rule can be made requires either the interpretation of complex statistical data or the formulation of public policy. The courts do not have the investigatory machinery to analyze complex socio-economic statistical data, nor are they properly empowered with the right to formulate and implement public policy.

James E. DeFranco, *Modification of the Employment-at-Will Doctrine—Balancing Judicial Development of the Common Law with the Legislative Prerogative to Declare Public Policy*, 30 ST. LOUIS U. L.J. 65, 107 (1985).

"would, among other things, place Ohio's courts in the untenable position of having to second-guess the business judgments of employers."⁹⁹ If the past is any reflection of things to come, chaos could soon predominate the employer-employee relationship. In analyzing these problems, along with suggesting an alternative approach, this Comment will look to other jurisdictions' wrongful termination statutes, paying particularly close attention to Montana's statutory based approach as well as a cursory evaluation of the Model Employment Termination Act.

1. *Uncertainty in the Law*

The quest for legal certainty in the context of the employment relationship is a major concern for all parties involved.¹⁰⁰ For instance, employees need certainty in order to allow them to protect themselves from abusive discharges, as well as maximize their economic potential.¹⁰¹ Likewise, employers need certainty in the employment context in order to provide some guidance throughout the termination process. Employers, moreover, need certainty in the remedy provisions to allow them some protection to terminate deserving employees.¹⁰² Additionally, unpredictable employment laws may conflict with

⁹⁹ *Mers v. Dispatch Printing Co.*, 483 N.E.2d 150, 153 (Ohio 1985).

¹⁰⁰ See Hahn & Smith, *supra* note 1, at 535.

¹⁰¹ There is the possibility of a "chilling effect" when uncertainty predominates the employer-employee relationship. Specifically, employers will be less likely to terminate employees, which leads to a reduction in demand for new workers. In this sense, uncertainty in the law amounts to a "regressive tax" on potential employees. See DeFranco, *supra* note 98, at 78-79; Jeffrey L. Harrison, *The "New" Terminable-at-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327, 360 (1984).

¹⁰² An employer may be forced to retain a below-average employee for fear that the employer has insufficient evidence to document the employee's incompetence. The employer, therefore, might be forced to retain a less efficient worker even if more efficient workers are available. The result is less productivity per employee and less efficient manufacturing of a product or providing of a service. Moreover, an employee retained for fear of litigation may cause severe morale problems among the employee's coworkers. See DeFranco, *supra* note 98, at 78.

A nationwide survey of 260 wrongful termination cases between January 1986 and October 1988 found that in the 166 cases won by employees, the average award was \$602,302, with a median of \$158,800. See IRA SHEPARD ET AL., *THE BUREAU OF NAT'L AFFAIRS, INC., WITHOUT JUST CAUSE: AN EMPLOYER'S PRACTICAL AND LEGAL GUIDE ON WRONGFUL DISCHARGE* 16 (1989).

Throughout the country, single individuals have received damages for a wrongful termination suit as high as \$20 million, \$4.7 million, \$3.25 million, and \$2.5 million. See

legislative attempts to create an attractive business climate in the state.¹⁰³ Finally, to all parties involved, certainty lowers litigation costs that are now such an unproductive drain on our economy.¹⁰⁴ In addition to actual litigation costs, expensive "defensive" termination practices also can be lowered.¹⁰⁵ Both employees and employers benefit by this lowering of expenses. It could, for example, potentially increase employees' pay and benefits.¹⁰⁶ Likewise, this saved money could be reinvested by employers into developing human capital in addition to increasing productivity.¹⁰⁷

Contrary to these goals, the rationale set forth in *Collins* provides only amorphous notions of public policy. From this uncertainty, employers are not able to structure progressive termination policies which allow them to avoid the

MODEL EMPLOYMENT TERMINATION ACT, prefatory note, (National Conference of Commissioners on Uniform State Laws 1991).

¹⁰³ See *Palmateer v. International Harvester Co.*, 421 N.E.2d 876, 885 (Ill. 1981) (Ryan, J., dissenting).

I do not believe that this court should further contribute to the declining business environment by creating a vague concept of public policy which will permit an employer to discharge an unwanted employee only at the risk of being sued in tort not only for compensatory damages, but also for punitive damages.

Id.

¹⁰⁴ A 1988 survey by the Rand Institute of wrongful termination suits in California found that the average cost of litigation incurred in defending a wrongful termination is \$80,073 and the median is \$65,000. See JAMES N. DERTOVZOS ET AL., *THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION* 38 (Rand Corp. 1988). In addition, litigation costs for employees are typically based on a contingency of 40% of the award. See *id.* at 39. Thus, with combined legal fees exceeding \$150,000 on average, the cost of litigation is nearly as great as the average total monetary amount awarded to successful employees in wrongful termination suits. See *id.* at 35.

¹⁰⁵ Defensive termination practices would include, among other things, spending more money on extensive employee files, long and oppressive grievance procedures and the necessity of legal advice prior, during, and after termination proceedings. While many of these costs are present in current employer-employee relationships, these costs are presumably increased when uncertainty predominates the arena in order to allow employers to fully document an employee's shortcomings.

¹⁰⁶ See RICHARD A. POSNER, *OVERCOMING THE LAW* 309 (1995); see also Harrison, *supra* note 101, at 360 (1984); Harrison, *The Price of Public Policy Modification of the Terminable-at-Will Rule*, 1983 LAB. L.J. 581, 583; Cynthia E. Boeye, Comment, *Employment at Will: An Analysis and Critique of the Judicial Role*, 68 IOWA L. REV. 787, 800 (1983).

¹⁰⁷ See generally Alan B. Krueger, *The Evolution of Unjust-Dismissal Legislation in the United States*, 44 INDUS. & LAB. REL. REV. 644 (1991).

drain of wrongful termination suits. Given the multiple sources from which a public policy exception can now be discovered, courts are faced with the daunting, if not impossible, task of determining an exception with any particularity. Conceivably under *Collins*, public policy could be subject to the whims of individual judges. As such, merits of cases will often not be determined by the law, but rather by clever counsel.¹⁰⁸ Yet, those who see this amorphous nature of the exception as a positive development for employees need to remember that the *Collins* framework provides a two-way street. Rights that should be protected can just as easily be taken away. Moreover, given the inconsistent jurisprudence by the Supreme Court of Ohio on this issue, the public policy exception could again be severely curtailed, or even abandoned, if judicial philosophies change.¹⁰⁹

Equally as serious, *Collins* adds uncertainty to the possible remedies available to a wrongfully discharged employee. For example, there is considerable doubt as to what constitutes the proper restitution for such a wrongful termination suit.¹¹⁰ Such a result could harm all parties involved. Employees, for instance, would be at risk that they will not be able to recover all damages to which they are entitled due to unsympathetic judges and juries. Likewise, employers could be subject to damages far in excess of what is deserved, even in spite of laws claiming otherwise. Finally, confidence as a whole in the courts could suffer as citizens would see them not as a forum where wrongs are vindicated, but where cases are determined by any number of subjective factors.

2. The Precision Paradox

Under the *Collins* rationale, the Supreme Court of Ohio suggests that when public policy can be discerned only from multiple sources, preemption must be clear and unambiguous in at least one statute in order for a common law recovery to be pre-empted.¹¹¹ As Justice Resnick stated in her opinion, "We do

¹⁰⁸ See Hahn & Smith, *supra* note 1, at 527-28.

¹⁰⁹ This Note acknowledges that *stare decisis* may provide guidance to protect the current public policy exception from judicial whims. It is the contention of this Note, however, that the Supreme Court of Ohio has been rather cavalier when dealing with *stare decisis* in past public policy cases. Consequently, this policy, while unlikely, needs to be addressed.

¹¹⁰ With this analysis, many questions remain unanswered. For instance, how clear must a remedy provision be in order for it to be pre-emptive?

¹¹¹ Yet, given the relatively new development of the public policy exception, most legislation was passed without an opportunity to address any potential wrongful termination implications.

not mean to suggest that where a statute's coverage provisions form an essential part of its public policy, we may extract a policy from the statute and use it to nullify the statute's own coverage provisions."¹¹² Thus, an interesting paradox is created. Where a public policy is clearly defined and remedy provisions are given, courts are precluded from allowing damages above and beyond the statutory provisions. Taken to the extreme, it appears that only when a public policy is vague and unspecified can a common law cause of action be presented. Accordingly, where a public policy cannot be discerned from a single statute, thus requiring the court to create a policy decision on its own by stringing various statutes together, courts have unfettered discretion in allowing a recovery amount.

This interesting paradox has implications which affect all interested parties. Where the Ohio Legislature has found a specific policy problem and addressed it by means of a statute, the legislature has expressed its will to limit a terminated employee's available damages.¹¹³ Thus, a conscious decision is made to provide an employer with a cap on what it may be required to pay. On the other hand, the court's discretion is the greatest where the Ohio Legislature has chosen not to directly legislate on an issue, but has tangentially addressed it in several statutes. However, the court overlooks the possibility that the Ohio Legislature's silence on the issue may have indicated a policy decision not to regulate such conduct. Additionally, employers may be fearful to risk certain terminations, which the Ohio Legislature may have conscientiously allowed, for fear of the unlimited nature of vague public policy claims. Hence, it appears that the Supreme Court of Ohio, in effect, may be protecting rights of employees that were conscientiously rejected by the Ohio Legislature more than those which the legislature actually intended to protect.

3. *Confusion Created by Common Law*

In allowing judicial decisions to serve as a source for public policy exceptions, the Supreme Court of Ohio has created a system which may engender protracted case-by-case litigation to define its scope. Such an approach would render any prediction of future cases "a hazardous undertaking at best."¹¹⁴ As one commentator noted, "[T]he expectations are not easy to articulate, and it should not be too surprising when a judicial decision in an

¹¹² *Collins v. Rizkana*, 652 N.E.2d 653, 661 (Ohio 1995).

¹¹³ See, e.g., Ohio's whistleblower statute, OHIO REV. CODE ANN. § 4113.52 (Baldwin 1994). For a more detailed discussion of this statute, see *infra* notes 122-26 and accompanying text.

¹¹⁴ See Cavico, *supra* note 5, at 519.

evolving area of private law does not articulate ideally the reasoning underlying its result.”¹¹⁵ After the above discussion of the need for certainty in employment law, one can easily see how ill-advised common law foundations for public policy exceptions would be.¹¹⁶

Additionally, using common law as public policy would completely eliminate any legislative role in determining public policy.¹¹⁷ Indeed, under such an approach, the courts would be usurping a defined legislative function.¹¹⁸ Furthermore, what expertise do the courts hold in this area? The courts may, in fact, be injecting themselves into a role they are ill-equipped to play

IV SOLUTIONS

Most major changes in employment law during this century, with the notable exception of wrongful termination causes of action, have been made by means of federal and state legislation.¹¹⁹ Providing an opportunity to have a direct say in the evolution of the common law, legislation provides a means to account for the shortcomings of the employment at will doctrine.¹²⁰ While undoubtedly legislative proposals are subject to outside influence of lobbying

¹¹⁵ Leonard, *supra* note 11, at 658–59; *see also* Lee Crawford, *You're Fired! Public Policy Wrongful Discharge*, 54 TEX. B.J. 330, 331 (1991); Louis L. Raben, Jr., et al., *Wrongful Discharge: A Panel Discussion*, Panel at the American Bar Association Annual Meeting (1989), in 6 LAB. LAW., Spring 1990, at 319, 327

¹¹⁶ Some courts, however, have adopted common law as a basis for public policy exceptions. As one court noted:

Limiting the scope of public policy to legislative enactments would necessarily eliminate aspects of the public interest which deserve protection but have limited access to the political process. Judicial decisions can also enunciate substantial principles of public policy in areas which the legislature has not treated.

Berube v. Fashion Ctr., Ltd., 771 P.2d 1033, 1043 (Utah 1989). Judicial activism in this regard, however, may be infringing on intentional legislative silence on the issue.

¹¹⁷ *See Cavico, supra* note 5, at 518–19.

¹¹⁸ *See, e.g., State v. Smorgala*, 553 N.E.2d 672, 674 (Ohio 1990) (“Judicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy.”).

¹¹⁹ *See Perritt, supra* note 79, at 422.

¹²⁰ One commentator has advanced that codification of wrongful termination law is especially likely to arise where judicial activism in recognizing exceptions to the employment at will doctrine has been especially dramatic. *See Krueger, supra* note 107, at 644.

and the like, they can, and sometimes do, reflect an approach beneficial to all parties involved.¹²¹

A legislative remedy to these problems would not be unprecedented. Ohio has, in the past, codified public policy exceptions to the employment at will doctrine. Among the most notable, Ohio's whistleblower statute¹²² provides specific procedures an employee must follow in order to gain statutory protections as a whistleblower.¹²³ Thus, the whistleblower statute resolves four problems presented by a common law approach to defining a public policy exception.¹²⁴ First, it affords employees legislated rights that are protected and intractable by the courts. Second, employers are presented with measures of assurances of what are acceptable termination practices. Third, procedural safeguards afford the employer the opportunity to correct the situation before it

¹²¹ Forty states, at one time or another, have had bills concerning "employment termination, at-will employment, or a related subject." See MODEL EMPLOYMENT TERMINATION ACT, prefatory note, (National Conference of Commissioners on Uniform State Laws 1991) (citing a survey by Professor Stuart Henry of Eastern Michigan University).

¹²² See OHIO REV CODE ANN. § 4113.52 (Baldwin 1994).

¹²³ Specifically, the text of section 4113.52 provides protection when the following requirements have first been satisfied: (1) the employee provided oral notification to the employer; (2) the employee then filed a timely written report with the supervisor; (3) the employer then failed to correct the violation or make a reasonable good faith effort to correct the violation. See OHIO REV CODE ANN. § 4113.52 (Baldwin 1994); see also *Contreras v. Ferro Corp.*, 652 N.E.2d 940, 944 (Ohio 1995).

¹²⁴ To date, at least thirty-five state legislatures have passed similar versions of whistleblower statutes. See ALASKA STAT. § 39.90.100 (1992); ARIZ. REV STAT. ANN. § 38-532 (West 1992); COLO. REV STAT. ANN. § 24-50.5-101 (1988); CONN. GEN. STAT. ANN. § 31-51m (West Supp. 1996); DEL. CODE ANN. tit. 29, § 5115 (Supp. 1994); FLA. STAT. ANN. § 112.3187 (West Supp. 1992); HAW. REV STAT. § 378-61 (1988); ILL. ANN. STAT. ch. 127, para. 63b91 (Smith-Hurd. 1992); IND. CODE ANN. § 36-1-8-8 (West Supp. 1996); IOWA CODE ANN. § 79.28 (West 1991); KAN. STAT. ANN. § 75-2973 (Supp. 1995); KY. REV STAT. ANN. § 61.102 (Michie 1993); ME. REV STAT. ANN. tit. 26, § 831 (West Supp. 1988); MD. CODE ANN. art. 64A, § 12F (Supp. 1992); MICH. STAT. ANN. § 17 421 (Supp. 1996); MINN. STAT. ANN. § 181.932 (West Supp. 1996); MO. ANN. STAT. § 105.055 (Vernon Supp. 1996); N.J. STAT. ANN. § 34:19-1 (West Supp. 1996); N.Y. LAB. LAW § 740 (West Supp. 1996); N.C. GEN. STAT. § 126-84 (1995); OHIO REV CODE ANN. § 4113.51 (Anderson 1991), OKLA. STAT. ANN. tit. 74, § 840-2.5 (West 1995); OR. REV STAT. ANN. § 659.505 (Supp. 1994); 43 PA. CONS. STAT. ANN. § 1421 (Supp. 1996); S.C. CODE ANN. § 8-27-10 (Law. Co-op Supp. 1995), TENN. CODE ANN. §§ 49-50-1401 (1990) & 50-1-304 (Supp. 1995); UTAH CODE ANN. § 67-21-1 (1995); WASH. REV CODE ANN. § 42.40.010 (West Supp. 1996); W. VA. CODE § 06C-1-1 (1993); WIS. STAT. ANN. § 230.80 (West 1987); WYO. STAT. ANN. § 35-2-910 (Supp. 1992).

reaches the court.¹²⁵ Finally, specific procedures and remedies are provided to ensure all parties involved predictability.¹²⁶

The state of Montana, in passing the Wrongful Discharge from Employment Act, has presented the most significant development at the state level in legislative responses to employment law. Indeed, Montana was one of a growing number of jurisdictions which began to recognize the tort of wrongful discharge. Responding to the increased concern regarding large jury awards,¹²⁷ high defense costs, and uncertainty as to the exact parameters of the law, the state legislature adopted the Montana Wrongful Discharge from Employment Act in May of 1987.¹²⁸ The Act gives rise to a cause of action for terminations, which, among other things, are in retaliation for an employee's refusal to violate public policy.¹²⁹ Additionally, Montana's statute creates a "just cause" standard of review for most termination cases. Compensatory damages for lost wages and benefits are allowable for a maximum of four years, but no other damages are allowable unless an employee can establish actual fraud or malice on behalf of the employer. Arbitration is an optional remedy—available only when both parties agree. Finally, the statute expressly preempts common law claims that may arise.¹³⁰

¹²⁵ See OHIO REV. CODE ANN. § 4113.52(A)(3) (Baldwin 1994).

¹²⁶ For a further discussion of whistleblower statutes, see generally MARCIA P. MICELLI & JANET P. NEAR, *BLOWING THE WHISTLE: THE ORGANIZATIONAL AND LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES* (1992); DANIEL P. WESTMAN, *WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE* (1991); Sheldon E. Friedman, *Whistleblowing: A Growing Trend*, 19 COLO. LAW. 1313 (1990); Lois A. Lofgren, Comment, *Whistleblower Protection: Should Legislatures and the Courts Provide a Shelter to Public and Private Sector Employees Who Disclose the Wrongdoing of Employers?*, 38 S.D. L. REV. 316 (1993).

¹²⁷ See, e.g., *Flanigan v. Prudential Fed. Sav. & Loan Assoc.*, 720 P.2d 257 (Mont. 1986) (awarding former employee \$1.3 million for punitive damages, \$100,000 for emotional distress, and \$93,000 for economic losses by a Montana jury where employer violated covenant of good faith and fair dealing by making false promises that an employee terminated for economic reasons would be rehired if she took a week-long training program).

¹²⁸ See Jonathan Tompkins, *Legislating the Employment Relationship: Montana's Wrongful-Discharge Law*, 14 EMP. REL. L.J. 387, 387 (1988).

¹²⁹ See MONT. CODE ANN. § 39-2-904 (1994).

¹³⁰ For a more complete analysis of Montana's Wrongful Discharge from Employment Act, see, e.g., Leonard Bierman & Stuart A. Youngblood, *Interpreting Montana's Pathbreaking Wrongful Discharge from Employment Act: A Preliminary Analysis*, 53 MONT. L. REV. 53 (1992); LeRoy H. Schramm, *Montana Employment Law and the 1987 Wrongful Discharge from Employment Act: A New Order Begins*, 51 MONT. L. REV. 94 (1990); Tompkins, *supra* note 128, at 392.

In addition to Montana's legislative alternatives, the National Conference of Commissioners on Uniform State Laws drafted and approved the Model Employment Termination Act (Model Act) in August, 1991. The primary purpose of the Model Act is to provide uniformity in employment termination law among the states that adopt it. Such efficiency and predictability is significant to an employer because it "obviously benefits from being able to have standardized personnel policies that would be effective beyond state lines."¹³¹ Similar to Montana, the Model Act changes the underlying nature of the employer-employee relationship. The Model Act provides that, as a general rule, "an employer may not terminate the employment of an employee without good cause."¹³² The Model Act, in addition to the good cause requirement, also includes jurisdiction and mandatory arbitration provisions.

The Model Act, however, has engendered a significant amount of controversy over its effectiveness and purpose.¹³³ To date, no state has yet

¹³¹ MODEL EMPLOYMENT TERMINATION ACT, prefatory note, (National Conference of Commissioners on Uniform State Laws 1991).

¹³² *Id.* § 1. Specifically, good cause is defined as:

(i) a reasonable basis related to an individual employee for termination of the employee's employment in view of relevant factors and circumstances, which may include the employee's duties, responsibilities, conduct on the job or otherwise, job performance, and employment record, or (ii) the exercise of business judgment in good faith by the employer, including setting its economic or institutional goals and determining methods to achieve those goals, organizing or reorganizing operations, discontinuing, consolidating, or divesting operations or positions or parts of operations or positions, determining the size of its work force and the nature of the positions filled by its work force, and determining and changing standards of performance for positions.

Id.

¹³³ For those commentators supporting the Model Act, see generally Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361 (1994); Debra Drew Cyranoski, Comment, *The Model Employment Termination Act: A Welcome Solution to the Problem of Disparity Among State Laws*, 37 VILL. L. REV. 1527 (1992).

For those commentators expressing critiques of the Model Act, see generally Michael S. Franczak, *The Model Employment Termination Act (META): Does It Violate the Right to Trial by Jury?*, 10 OHIO ST. J. ON DISP. RESOL. 441 (1995); Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8 (1993); Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849 (1994); Jeanne Duquette Gorr, Comment, *The Model Employment Termination Act: Fruitful Seed or Noxious Weed?*, 31 DUQ. L. REV. 111 (1992); Dawn S. Perry, Comment, *Deterring Egregious Violations of Public Policy: A*

adopted it. Given the lack of popularity as well as the controversy surrounding the Model Act, it is unlikely that Ohio, which has traditionally been conservative in passing employment laws, would adopt such a radical measure. Any successful legislation in Ohio would need to be significantly narrower in scope.

Evaluating whether legislative proposals have achieved any success often lies in the viewpoint from which a party stands.¹³⁴ Recent commentators have suggested four principal issues surrounding the creation of wrongful discharge legislation:

- 1) Protections established: What standard should govern terminations of employment relations? Should high level employees be covered by the statutory protections, and if so, should the standard be the same as for lower level employees?¹³⁵
- 2) Coverage of the act: Should economically motivated eliminations of positions and layoffs be covered by the statute, and if so, what standards should govern such events?
- 3) Remedies: What statutory damages and other common law remedies, if any, should be available to terminated employees?
- 4) Procedure: What dispute resolution methods should the Act utilize?¹³⁶

Indeed, the fact that only one state has successfully passed a wrongful termination statute, while many others have failed, demonstrates the political volatility of these issues.¹³⁷

Proposed Amendment to the Model Employment Termination Act, 67 WASH. L. REV 915 (1992).

¹³⁴ See Hahn & Smith, *supra* note 1, at 526.

¹³⁵ Additional questions could include: Given that higher level employees are usually subject to more subjective criteria, should wrongful termination legislation recognize this fact and make the appropriate distinctions?

¹³⁶ See *id.* at 527-28.

¹³⁷ Currently, several states have wrongful termination statutes pending action in their respective legislative bodies. Presented below is a brief overview of some of the provisions. California: S. 774, 1995-96 Leg., Reg. Sess. (Cal. 1995), available in Westlaw, CA-BILLS Database:

Recognizes that existing law does not expressly prescribe or limit the amount of damages recoverable on wrongful discharge of an employee in violation of public policy; the bill attempts to limit the sum of any compensatory damages for future pecuniary losses, nonpecuniary losses, exemplary damages, and any administrative fines. The amount awarded to a successful claimant is determined by the number of persons employed by the employer against whom the damages are asserted.

H. 355, 18th Leg. (Haw. 1995), *available in* LEXIS, Legis Library, HITEXT File:

Establishes uniform employment termination law unless otherwise provided in an agreement for severance pay, or for a specified duration; prohibits an employer from terminating the employment of an employee without "good cause;" provides criteria for good cause; establishes procedures and limitations for employees and employers relating to demand for arbitration upon the termination of any employee; requires arbitrators, within 30 days, to mail or deliver to the parties a written award sustaining or dismissing a compliant.

Missouri: H. 1111, 88th Leg., 2d Sess. (Mo. 1996), *available in* LEXIS, Legis Library, MOTEXT File:

Introduced to, except for some minor exceptions such as collective bargaining agreements, state or federal statutes, or an agreement otherwise, displace and extinguish all common law rights and claims of a terminated employee against a former employer. Unless otherwise provided in an agreement for severance pay or for a specified duration, an employer may not terminate the employee without good cause.

New York: S. 4103, 219th Leg., 2d Reg. Sess. (N.Y. 1995), *available in* LEXIS, Legis Library, NYTEXT File:

Prohibits discharging alien employees who are legally restricted from other employment unless good cause for discharge is shown.

Oklahoma: S. 564, 45th Leg., 1st Reg. Sess. (Okla. 1995), *available in* LEXIS, Legis Library, OKTEXT File:

Provides that an employer may not terminate an employee without good cause, unless otherwise provided in an agreement for severance pay or for a specified duration; providing that a terminated employee may file an action or demand arbitration.

Virginia: H. 1375, 1996 Sess. (Va. 1996), *available in* LEXIS, Legis Library, VATEXT File:

Prohibits employers from discharging, disciplining or penalizing any employee who, in the course of his employment, refuses to take any employer-directed action that would endanger public safety.

See also H. 874, 88th Leg., 2d Sess. (Mo. 1996), *available in* LEXIS, Legis Library, MOTEXT File; H. 1343, 45th Leg., 1st Reg. Sess. (Okla. 1995), *available in* LEXIS, Legis Library, OKTEXT File; H. 1344, 45th Leg., 1st Reg. Sess. (Okla. 1995), *available in* LEXIS, Legis Library, OKTEXT File.

What would be the objective goals that an Ohio public policy statute would attempt to resolve? First, any statute must limit the discretion of the courts in finding public policy exceptions. However, the statute would need to allow some flexibility, although considerably less than now exists, to protect important employee rights not yet articulated. In deference to the legislature, a public policy statute should limit recovery only when it could be a logical extension of articulated legislative intent to protect an employee's right. Second, to ensure that frivolous claims are not warranted, a violation must be of as serious import as the violation of a statute. Additionally, remedies must be precisely defined and limited. Generally, they should include backpay and frontpay, as well as attorney's fees. Reinstatement could potentially be an option, although this should not be encouraged for a variety of reasons.¹³⁸ Punitive damages should only be allowed in instances where an employer's conduct has been especially egregious. Finally, a proposed public policy statute should not fundamentally alter the existing employment relationship by creating a just cause standard or alter the basic premise of the at will status.¹³⁹ Similarly,

¹³⁸ These reasons include the option of frontpay for a period of years available to compensate for any difference that might arise from a disparity in a lack of pay between a former job and a current one. Likewise, it may be detrimental to all parties involved to require the reinstatement of an employee into a hostile environment.

¹³⁹ The purpose of this proposed legislation is not to fundamentally alter the employment at will status in the workplace. Rather, it is intended to provide a remedy to solve some problems inherent in Ohio's current public policy jurisprudence. Many articles have specifically dealt with the merits of a just cause standard of termination to alter the employment at will context. One of the more interesting recent articles is written by law and economics guru Richard Posner. Posner provides an interesting perspective on the employment at will doctrine, defending it against any just cause proposal. Specifically, Posner provides a practical analysis on why a just cause regime would harm, rather than help, employees. Posner finds that just cause legislation would, among other things, decrease employees' wages, increase employment, and decrease employees' discretion. See Posner, *supra* note 106, at 305-11. For other commentators supporting the employment at will doctrine, see Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984) (defending the employment at will doctrine on both economic and ethical grounds); Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097 (1989); Gail L. Heriot, *The New Feudalism: The Unintended Destination of Contemporary Trends in Employment Law*, 28 GA. L. REV. 167 (1993); Edward P. Lazear, *Employment-at-Will, Job Security and Work Incentives*, in *EMPLOYMENT, UNEMPLOYMENT AND LABOR UTILIZATION* 39 (Robert A. Hart ed., 1988).

For commentators making arguments opposed to the employment at will doctrine, see Drucilla Cornell, *Dialogic Reciprocity and the Critique of Employment at Will*, 10 CARDOZO L. REV. 1575 (1989) (putting forth a Hegelian critique of employment at will); Leonard, *supra* note 11, at 631.

it should encourage alternative dispute resolution, but in no way should the proposed statute require it.¹⁴⁰

A suggested statute could read:

The Public Policy Exception to the Employment at Will Doctrine

(1) For a claim for damages to be recognized for the public policy exception, all of the following criteria must be met:

- (a) where the exception is a logical and clear extension of articulated legislative intent to protect an employee's right; and
- (b) where the exception is of at least equally serious import as a statute; and
- (c) the complaint has been brought within two years from the time of dismissal.

(2) Any party can request arbitration and such arbitration shall be allowed only with the consent of the other party. If a party refuses to arbitrate and loses the case in the courts, that party shall be liable for all court costs incurred.

(3) Remedies for a wrongful termination action based on a public policy exception shall be limited to:

- (a) Backpay: Such backpay shall be reduced by an amount which could have been made had the claimant made reasonable attempts to procure other employment.
- (b) Frontpay: (i) Such frontpay shall not be extended for more than a period of two years; and (ii) Shall be reduced by any amount received as a result of future employment enabled by the claimant's termination or such an amount had the claimant made reasonable attempts to procure future employment.
- (c) Attorney fees: Such fees shall be recoverable from the employer in a successful action by the claimant.
- (d) Reinstatement shall be an option only if both parties agree.

(4) Only in cases of egregious behavior on the part of the employer shall punitive damages be awarded.

¹⁴⁰ While it is the contention of this Note that alternative dispute resolutions offer attractive options to the judicial process, to mandate them would fundamentally change the nature of the termination process. Rather, to do so would go beyond the scope of this proposal, which is merely to provide a simple, yet flexible, resolution to the amorphous and unpredictable nature of Ohio's current public policy jurisprudence.

V CONCLUSION

Ohio courts must be commended for joining the great majority of jurisdictions which recognize some form of a public policy exception to the harshness of the employment at will doctrine. In its enthusiasm, however, the Supreme Court of Ohio has gone too far in proposing a virtually limitless list of sources in which public policy can be discerned. It has, additionally, created a current jurisprudence where uncertainty predominates. As such, current Ohio jurisprudence infringes too far on the discretion of employers, often placing them in constant apprehension of potential wrongful termination suits.

To rectify this undesirable situation, legislative guidance offers the most potential for success. It affords employees the accessibility and protection of a public policy exception. Moreover, it allows employers predictability and further allows them to conform their termination policies with the law, taking away the potential risk of a wrongful termination suit. Undeniably, workplace relations stir up deep passions in the heart of all interested parties. Taking this into account, a legislative alternative provides the best means to ensure the rights of all interested parties.

